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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIANT CHUN-HOON and CARLO
GUGLIELMINO,

Plaintiffs,

v

MCKEE FOODS CORPORATION, a
Tennessee corporation; and DOES 1
through 100, inclusive,

Defendants.

C 05-0620 VRW

ORDER

Class Action

This Document Relates to: All
Actions

_____/

This is a proposed class action against McKee Foods
Corporation ("McKee") for violation of the overtime requirements of
the labor code of California, fraud, negligent misrepresentation,

1 breach of contract, unfair and fraudulent business practices and
2 declaratory relief. Doc # 1. Pursuant to FRCP 23(e), plaintiffs
3 Briant Chun-Hoon and Carlo Guglielmino and defendant McKee
4 (collectively the "parties") seek approval of a settlement and
5 notice to the purported class. Doc # 93.

6 McKee manufactures Little Debbie Snack Cakes and Sunbelt
7 snacks and cereals. McKee sells its products to independent
8 distributors, who then resell the products to supermarkets, mass
9 merchandisers and other retail outlets. Id.

10 Plaintiffs, who were distributors of McKee products in
11 the San Francisco Bay area, filed this case on behalf of themselves
12 and a putative class of distributors. Plaintiffs' claims are based
13 on the proposition that they were not treated as independent
14 contractors and that the court therefore should disregard the terms
15 of written distributorship agreements they signed with McKee.
16 McKee contends, among other things, that the evidence shows that
17 class members operated independent businesses. Id.

18 On June 6, 2006, the court entered an order provisionally
19 certifying a damages class under Federal Rule of Civil Procedure
20 23(b)(3). Doc # 59. The provisionally-certified class consists of
21 all distributors of McKee products in California who signed written
22 distributorship agreements with McKee after December 31, 2000. Doc
23 # 93.

24 After unsuccessful settlement discussions, the parties
25 engaged former United States District Judge Eugene F Lynch to
26 mediate the case. On January 7, 2009, Judge Lynch conducted a
27 full-day mediation with the parties and their counsel. During the
28 mediation, the parties met together and separately with Judge Lynch

1 and proposed settlement terms. This proposed settlement agreement
2 is the result of that mediation session. Id.

3
4 I

5 Federal Rule of Civil Procedure 23(e) requires court
6 approval for the settlement of any class action. In order to be
7 approved, a settlement must be "fundamentally fair, adequate and
8 reasonable." Torrissi v Tucson Elec Power Co, 8 F3d 1370, 1375 (9th
9 Cir 1993), quoting Class Plaintiffs v Seattle, 955 F2d 1268, 1276
10 (9th Cir 1992).

11 Class action settlement approval that takes place prior
12 to the class certification stage requires "a higher standard of
13 fairness." Hanlon v Chrysler Corp, 150 F3d 1011, 1026 (9th Cir
14 1998). The judge must conduct a "more probing inquiry" in order to
15 protect the plaintiff class because there is a danger of collusion
16 between class counsel and the defendant. Id. As Judge Friendly
17 explained in the stockholder derivative class action context,
18 "[o]nce a settlement is agreed, the attorneys for the plaintiff
19 stockholders link arms with their former adversaries to defend
20 joint handiwork." Alleghany Corp v Kirby, 333 F.2d 327, 347 (2d
21 Cir 1964) (Friendly dissenting). Nevertheless, because a
22 settlement seeks to avoid trial and wasteful litigation, "the court
23 must not turn the settlement hearing 'into a trial or rehearsal of
24 the trial.'" Saylor v Lindsley, 456 F2d 896, 904 (2d Cir 1972).

25 The question currently before the court is whether this
26 settlement should be preliminarily approved. "[The] preliminary
27 determination establishes an initial presumption of fairness * *
28 *." In re General Motors Corp, 55 F3d 768, 784 (3d Cir 1995). As

1 noted in the Manual for Complex Litigation, Second, "[i]f the
2 proposed settlement appears to be the product of serious, informed,
3 non-collusive negotiations, has no obvious deficiencies, does not
4 improperly grant preferential treatment to class representatives or
5 segments of the class, and falls within the range of possible
6 approval, then the court should direct that the notice be given to
7 the class members of a formal fairness hearing * * *." Manual for
8 Complex Litigation, Second § 30.44 (1985). In addition, "[t]he
9 court may find that the settlement proposal contains some merit, is
10 within the range of reasonableness required for a settlement offer,
11 or is presumptively valid." Schwartz v Dallas Cowboys Football
12 Club, Ltd, 157 F Supp 2d 561, 570 n12 (ED Pa 2001) (quoting
13 Newberg on Class Actions § 11.25 (1992)). In other words,
14 preliminary approval of a settlement has both a procedural and a
15 substantive component.

16 17 II

18 The court is not convinced entirely that the settlement
19 confers a benefit to the class. The settlement provides current
20 distributors with case cost credits of \$250, which distributors may
21 use for the purpose of promoting sales of Little Debbie and Sunbelt
22 products. Additionally, current distributors will have an
23 opportunity to attend a marketing seminar, during which McKee
24 representatives will reemphasize the rights and freedoms that
25 distributors have and provide business models and practices that
26 other distributors have used to increase their sales. It is not
27 clear that case cost credits confer any real benefit to the class.
28 In fact, the type and nature of the credits seem to benefit the

1 manufacturer of Little Debbie and Sunbelt products just as much if
2 not more than the distributors. The marketing seminars, on the
3 other hand, may be of the type to confer benefits to the class – at
4 least with respect to educating distributors on how to increase
5 their sales. However, the court will take into consideration any
6 objections that challenge the benefit of the seminars in its final
7 settlement determination.

8 The settlement provides two options for former
9 distributors. Under option one, a former distributor may attend
10 marketing seminars of the type described above. Additionally,
11 former distributors who voluntarily terminated their
12 distributorship agreements with McKee in good standing may be
13 considered for reappointment as independent distributors in any
14 territories that are open and available. As noted above, the court
15 is concerned that the seminars do not convey a benefit to the
16 class. Further, the court is not aware of the number of former
17 distributors that would be eligible for reinstatement under these
18 nebulous terms. For instance, the number of open and available
19 territories, as well as the number of independent distributors that
20 voluntarily terminated their agreements in good faith, are outside
21 of the court's knowledge.

22 Under the second option, former distributors who elect
23 not to attend the marketing seminars or request reappointment will
24 receive a payment from McKee in the amount of \$250. Of the
25 purported benefits listed above, this type of payment clearly is
26 the most beneficial to the class.

27 Despite these concerns, for the purposes of preliminary
28 approval, the court finds that the proposed settlement is "within

1 the range of possible approval." Schwartz, 157 F Supp 2d at 570
2 n12 (quoting Manual for Complex Litigation, Second § 30.44 (1985)).
3 While the purported benefits to the class are not obvious from the
4 language of the proposed settlement, the absence of objections may
5 indicate that the case credits and seminars are in fact valuable to
6 class members. Therefore, in determining whether the settlement
7 merits final approval, the court will consider seriously the number
8 and type of objections and requests for exclusion.

10 III

11 The court next considers the form of notice. Class
12 members are entitled to the "best notice that is practicable under
13 the circumstances." FRCP 23(c)(2)(B). The parties propose the
14 following notice plan: (1) McKee will mail notice along with a
15 claim form and request for exclusion to the last known address of
16 each class member as such appears in McKee's records; (2) if any
17 mailing addressed to a current distributor is returned as
18 undeliverable, a McKee representative will attempt to deliver the
19 mailing to the current distributor by hand; (3) if any mailing
20 addressed to a former distributor is returned as undeliverable,
21 McKee will use the former distributor's social security number and
22 last known address and last known telephone number in an effort to
23 locate the former distributor and will send an additional notice,
24 claim form and request for exclusion to any address so determined;
25 and (4) if any original or subsequent mailing to a class member is
26 not returned as undeliverable within thirty (30) days of the
27 mailing, it will be presumed that the class member received the
28 mailing. Doc #93 at 18-19 (emphasis added). Because the proposed

notice provides for detailed methods of contacting both former and current distributors in the event that the original mailings are returned as undeliverable, the court finds that such notice is appropriate in this case.

Further, the court finds the content of the proposed notice to be appropriate. The notice outlines: the background of the case; a summary of the settlement and of settlement negotiations; what current and former distributors will receive as result of the settlement; how to opt out, object or otherwise comment on the settlement; attorneys fees; who to contact for additional information; and a paragraph outlining the review and approval process the court will implement to determine whether the settlement warrants approval. Doc # 94 Exh B; letter provided by joint counsel on September 29, 2009 at 14. As a consequence, the proposed form of notice provides class members with information on which to base their decision to remain in the class, opt out or object to the settlement. Accordingly, the court APPROVES the proposed form of notice, as to both form and content.

IV

In sum, the court GRANTS the parties' motion for preliminary approval of the proposed settlement and APPROVES the forms and manner of notice described in the revised proposed settlement agreement and forms of notice.

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1 Additionally, the court ORDERS the following schedule for
2 further proceedings:

Date	Event
On or before October 28, 2009	Send Notice
December 30, 2009	Deadline to postmark objections or opt out
January 6, 2010	Deadline for filing briefing in support of final approval of settlement
January 14, 2010	Hearing on final approval of settlement

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14 At the final approval hearing on January 14, 2010, at
15 10:00 AM, the court will determine: (1) whether the proposed
16 settlement agreement and forms of notice should be approved as
17 fair, reasonable and adequate; (2) the merits of objections, if
18 any, made to the settlement or any of its terms; (3) the amount of
19 litigation costs, expenses and attorney fees, if any, that should
20 be awarded to class counsel; and (4) any other matter related to
21 the settlement.

22
23 IT IS SO ORDERED.

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26
27 VAUGHN R WALKER

28 United States District Chief Judge